Supreme Court, U.S.
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No. 08 -

In The
SUPREME COURT OF THE UNITED STATES

Boris Vakker, (Agency No. 79-014-570)
Petitioner,
vs.
Michael B. Mukasey, US Attorney General
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

There has been disagreement among the circuit courts as to whether an individual who arrived in the United States pursuant to a grant of parole, and thereby designated as an arriving alien, as that term is defined under immigration law, is entitled to request renewal of a previously denied application for adjustment of status during removal proceedings pending before the immigration courts. The US Court of Appeals for the 3rd Circuit, in *Zheng v. Gonzales*, 422 F.3d 98 (3rd Cir. 2005), invalidated an agency regulation, 8 C.F.R. section 1245.1(c)(8), that purported to render all paroled aliens ineligible to request renewal of a denied adjustment application during removal proceedings. After determining that the regulation was invalid, the Circuit Court acknowledged that it was uncertain as to whether the agency or the immigration court had jurisdiction to consider a renewed request for adjustment of status. For this reason, the Circuit Court remanded the matter to the agency for its resolution of the jurisdictional issue.

Subsequent to the publication of the *Zheng* decision, the agency, on or about May 12, 2006, adopted revised regulations, namely, 8 C.F.R. section 1245.2(a)(1), "Eligibility of Arriving Aliens in Removal Proceedings To Apply For Adjustment of Status and Jurisdiction To Adjudicate Applications for Adjustment of Status".

Though the Circuit Court's analysis included review of an additional regulation, namely 8 C.F.R. section 1245.2(a),[1] the court's analysis was silent as to whether these regulations were applicable to an alien in removal proceedings who, though originally designated as a parolee, later acquired a lawful immigration status, nor do the regulations clarify which status, parolee or lawful resident, is most relevant when determining the alien's eligibility to seek adjustment of status in removal proceedings.

The question presented is:

I. Whether the Court of Appeals erred in failing to grant the Petitioner's remand request for agency determination of his eligibility to request renewed consideration of his previously denied application for adjustment of status where the agency denied his request to renew the application because he was considered to be a parolee, where the Petitioner, though originally granted humanitarian parole, acquired a different lawful and non discretionary immigration status following the grant of his application for withholding of removal, where his new status was granted prior to the conclusion of the administrative proceedings, when no law or regulation required that he continued to be designated as a

[1] This regulation set forth additional requirements for renewal that must be met before the renewal request made by a paroled alien in removal proceedings could be considered.

parolee or an arriving alien following his grant of withholding and when regulations adopted while his federal appeal was pending extended to immigration judges exclusive jurisdiction over ***all*** applications for adjustment of status presented by aliens in removal proceedings who hold a status other than that of an arriving alien?

CORPORATE DISCLOSURE STATEMENT

Boris Vakker is an individual and has no corporate involvement relevant to these proceedings.

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OPINIONS BELOW

The opinion of the Court of Appeals below, dated March 14, 2008 is reported at –F.3d – (3rd Cir. 2008; WL 681849) and is reprinted at Appendix A. The opinion of the Board of Immigration Appeals, dated February 14, 2006 is reprinted at Appendix B.

JURISDICTION

The decision of the Circuit Court on Petitioner's Petition for Review was entered on March 14, 2008. The jurisdiction of this court is invoked pursuant to 28 USC sections 1254(1).

STATUTORY PROVISIONS INVOLVED

Immigration and Nationality Act, 8 U.S.C. Section 1231(b)(3) [Section 241(b)(3)]: Restriction on Removal to a Country Where Alien's Life or Freedom Would be Threatened-

(A) In General

> Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion....

Immigration and Nationality Act, 8 U.S.C. Section 1255(a) [Section 245(a)]:

Status as Person Admitted for Permanent Residence on Application and Eligibility for Immigrant Status-

> The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him his application is filed.

PARTIES TO THE PROCEEDINGS

Petitioner is Boris Vakker, a native and citizen of Russia who has been granted immigration relief in the form of withholding of removal. Petitioner currently resides in the United States. The Respondent is Michael B. Mukasey, the Attorney General of the United States.

STATEMENT OF THE CASE

1. Federal Appellate Background-

The US Court of Appeals for the Third Circuit dismissed the Petitioner's petition for review upon its determination that the Board of Immigration Appeals ("BIA"/ "Board") did not err when it denied his motion for remand for further agency consideration of the Petitioner's request to renew his denied application for adjustment of status in the removal proceedings.

In pursuit of his legal challenge, the Petitioner relied, in part, upon the decision of the Court Of Appeals in *Zheng v. Gonzales*, 422 F.3d 98 (3rd Cir. 2005), in which the Circuit Court deemed 8 C.F.R. section 1245.1(c)(8) to be invalid. The regulation was jurisdictional in that it purported to prohibit, categorically, all parolees from renewing their previously denied applications for adjustment of status during removal proceedings. Though in *Zheng*, the Court rejected the purported jurisdictional bar, it left undecided the question of whether the Department of Homeland Security or the office of the immigration judge should adjudicate such renewed applications.

In the proceedings before the Circuit Court, the Petitioner asserted, specifically, that inasmuch as the agency had recently adopted interim regulations that extended to immigration judges "exclusive jurisdiction" over renewed adjustment applications presented by most aliens subject to removal proceedings, the matter should be remanded. Further, the Petitioner asserted that the Board's prior denial of the remand request was incomplete because it did not specify which regulatory requirement the Petitioner failed to satisfy under the then existing regulatory scheme.

Moreover, inasmuch as the new revised regulations had not yet been adopted at the time of the issuance of the adverse BIA decision, the Board had not been given the opportunity to consider Petitioner's request that he be permitted to renew the application before the immigration judge pursuant to the new "exclusive jurisdiction" section of the new regulation.

Additionally, Petitioner asserted that the Board never considered whether the Petitioner's receipt of withholding of removal rendered its application of former 8 C.F.R. 1245.2(a) to his case inappropriate.

The Court of Appeals rejected the Petitioner's challenge, as it asserted that the Petitioner was a "paroled" alien and was, thus, subject to the eligibility requirements outlined at 8 C.F.R. section 1245.2(a)(1). The 3rd Circuit's analysis did not discuss, however, the fact that as of the date on which the final administrative order was entered, the Petitioner held a status other than that as a parolee. Accordingly, Petitioner asserts that the regulations upon which the 3rd Circuit relied were plausibly inapplicable to the Petitioner and the matter should have been remanded to the agency for further consideration of the relevant eligibility and jurisdictional issues.

2. Background In Administrative Proceedings -

The Petitioner is Boris Vakker, born on June 22, 1961 in Moscow, Russia. The Petitioner was paroled into the United States on or about July 21, 2001 as an individual "following to join" his parents, who were admitted to the United States in 1997 as Jewish

refugees under the provisions of the Lautenberg Amendment. The Petitioner was permitted to enter the United States as it was deemed to be of significant humanitarian public benefit.

The Petitioner was placed into proceedings before the immigration judge through the filing of form I-862, a notice to appear, dated October 29, 2004. In the notice to appear, the agency asserted that the Petitioner was convicted, on or about March 9, 2004, before the US District Court for the Southern District Of New York, of Conspiracy to Commit Alien Smuggling , in violation of 18 USC section 371. In view of the criminal allegation, the agency sought the Petitioner's removal from the United States pursuant to the Immigration and Nationality Act, 8 USC Sections 1182(a)(2)(A)(i)(I), as an alien convicted of a crime of moral turpitude; Section 1182(a)(7)(A)(i)(I), as an immigrant not in possession of a valid entry document; and Section 1182(a)(6)(E)(i), as an alien who knowingly participated in the illegal entry of another alien into the United States in violation of law.

The immigration judge sustained the charges of removal and the Petitioner requested relief from removal in the form of asylum, withholding and relief under the UN Convention Against Torture ("CAT"). Additionally, the Petitioner requested that he be permitted to renew his application for adjustment of status in the removal proceedings as the application had been previously denied by the agency due to his conviction. The immigration judge asserted that he had no jurisdiction to consider the renewal of the adjustment application, but permitted the Petitioner to

seek protection relief. In a written decision issued on or about April 25, 2005, the immigration judge denied the Petitioner's application for asylum, granted the application for withholding of removal and declined to make any findings on the application under CAT. Specifically, the immigration judge determined that the record supported the Petitioner's claim of past persecution, and held that the agency failed to establish sufficient changed country conditions necessary to overcome the finding of past persecution, as required by 8 CFR section 1208.16(b)(1).

The agency filed an appeal of the immigration judge's decision seeking to have the grant of withholding of removal vacated. Though the Petitioner did not originally file an appeal of any of the decisions rendered by the immigration judge, after the agency's appeal was docketed, he filed a motion to remand the proceedings to permit the renewed adjudication of his application for adjustment of status due to a decision rendered by the US Court of Appeals for the 3rd Circuit that invalidated an agency regulation that attempted to prohibit, categorically, consideration of such applications when filed by parolees in removal proceedings. [See, *Zheng* (supra)] Petitioner asserted that the intervening decision required reconsideration of the jurisdictional determination of the immigration judge.

In a decision issued on or about February 14, 2006, the Board denied the agency's appeal as well as the Petitioner's motion for remand. With respect to the motion for remand, the Board determined that the Petitioner had not met the requirements for renewal

of his adjustment application as outlined at 8 C.F.R. section 1245.2(a). The Board did not specify which requirements Petitioner failed to meet. Nor did its rationale regarding the denial of the motion to remand acknowledge the fact that it granted of withholding relief to the Petitioner or what relevance the lawful status acquired with the grant of withholding had with respect to the motion to remand or the applicability of section 1245.2(a).

Subsequent to its adjudication of the agency appeal and Petitioner's motion for remand, the Board remanded the proceedings to the immigration court to complete security clearances required as the consequence of the grant of withholding relief to the Petitioner pursuant to 8 C.F. R. Section 1003.1(d)(6) and 1003.47(h) as well as its decision in *In re Fabricio Alcantara-Perez*, 23 I&N Dec. 882 (BIA 2006).

Upon completion of all the required security clearances, the immigration judge entered the final administrative order on or about March 13, 2006.

Subsequent to the filing of the petition for review, the agency adopted new regulations, at 8 C.F.R. section 1245.2(a)(1), in which it extended to immigration judges "exclusive jurisdiction" to consider the renewed adjustment applications of most aliens in removal proceedings.

REASONS FOR GRANTING THE PETITION

The US Court of Appeals for the Third Circuit erred in denying the Petitioner's request to remand his immigration proceedings to the Executive Office For

Immigration Review for a determination as to whether its revised regulations at 8 C.F.R. section 1245.2(a)(1) required that his renewed application for adjustment of status be adjudicated by the immigration judge and for a determination as to whether Petitioner's receipt of withholding of removal, and the mandatory residency status that accompanied his receipt of that form of relief, permitted him to seek adjustment of status in removal proceedings because the Board had no genuine opportunity to address these issues as the relevant regulation was not implemented until after issuance of the final administrative order in Petitioner's removal proceedings.

- State of the Law-

The term "arriving alien" means "...an alien who seeks admission to or transit through the United States...An arriving alien remains such even if paroled pursuant to section 1182(d)(5) of the Act." 8 C.F.R. Section 1.1(q).

A significant number of federal Circuit Courts that have considered the issue, have held that the Respondent may not categorically preclude all aliens paroled into the United States from seeking adjudication of applications for adjustment of status simply because they are aliens in removal proceedings. *Zheng v. Gonzales*, 422 F.3d 98 (3rd Cir. 2005) [See also, *Sucar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005); *Rodriguez de Rivera v. Ashcroft*, 394 F.3d 37 (1st Cir. 2005); *Scheerer v. Attorney General*, 445 F.3d 1311 (11th Cir.2006); *Bona v. Gonzales*, 425 F.3d 663, (9th Cir. 2005); see also *Mouelle v. Gonzales*, 416 F.3d 923 (8th Cir. 2005) and *Momin v. Gonzales*, 447 F.3d

447(5th Cir. 2006) for the contra view.] In view of these decisions largely invalidating agency regulation 8 C.F.R. 1245.1(c)(8), the Secretary of Homeland Security and the Attorney General have withdrawn the regulation[2] and implemented an alternate regulation, 8 C.F.R. section 1245.2(a)(1).

Prior to the conclusion of the Petitioner's removal proceedings, the Respondent interpreted the Immigration and Nationality Act as precluding the renewal of a denied adjustment application by alien parolees in removal proceedings if the alien had not met the requirements of 8 C.F. R. section 1245.2(a). That regulation precluded consideration of renewal applications in removal proceedings unless the denied application was filed while the alien was lawfully admitted and the alien was granted advance parole to return to the United States for the purpose of prosecuting the application. *Vakker v. Attorney General* (supra). [See also, *Jiang v. Gonzales,* 425 F.3d 649 (9th Cir. 2005)]

The revised regulation, however, grants exclusive jurisdiction to immigration judges over ***any*** adjustment of status application presented by an alien in removal proceedings unless the alien falls within the class of individuals defined as arriving aliens. This differs from the prior regulation which only referenced "parolees" rather than all arriving aliens. Under the current regulation, the jurisdiction to adjudicate ***any*** adjustment application of an arriving alien, whether a

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[2]Federal Register Vol.71 No 92, May 12, 2006, at pages 27587 and 27591.

renewed application or an original one, lies with the US Citizenship and Immigration Services (USCIS), an agency within the Department of Homeland Security[3]

The issue that has yet to be adjudicated and has not been clarified by the regulations is whether an alien's prior status as a parolee/arriving alien continues to serve as a barrier to the pursuit of a second application for adjustment and/or renewal of a previously denied application for adjustment of status in removal proceedings where the alien is granted relief from removal and thereby acquires an alternate form of lawful status in the United States.

ARGUMENT

Though the Petitioner had originally been placed into removal proceedings as an arriving alien, due to his having been paroled into the United States under the Lautenberg Amendment[4], the Board provided no analysis as to why it believed that the Petitioner continued in his status as a parolee/arriving alien notwithstanding its determination that he met the eligibility requirements for withholding of removal.

While it s true that aliens granted withholding of removal are not, otherwise, entitled to obtain lawful *permanent residence* on account of receiving withholding, such aliens are permitted to reside and work in the United States, and as such, they are

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[3]Id at page 27587.

[4](P.L. 101-167)[63 FR 12987, March 17, 1998]

lawfully present in the United States. The withholding statute provides that the Petitioner, as the recipient of a grant of withholding of removal, can not be removed from the United States and returned to Russia, because Petitioner had demonstrated that his life and/ or freedom would be threatened in Russia due to his religion and social group.

The Petitioner requested that in view of this change in his immigration status between his original placement into proceedings as an arriving alien/ parolee and the withholding status he was granted by the Board, the Board should have had the opportunity, through remand, to determine whether its revised regulations exempted him from the bar that precluded his renewal of his adjustment application in removal proceedings.

Although the Court of Appeals asserted in its opinion below that the revised regulations asserted by the Petitioner appeared to offer him "...no greater support than the previous versions,"[5] The Court of Appeals was incorrect. The court outlined the text of the two statutes in its opinion, noting that the original regulation, 8 C.F.R. section 1245.2(a), in operation at the time of the BIA's decision read:

> An adjustment application *by an alien* ***paroled*** under section 1182(d)(5) of the Act, which has been denied by the director, *may be renewed* in removal proceedings under 8 CFR part 1240 only if:
> (i) the denied application must have been properly

[5]See page 13 of 15.

> filed...; and
> (ii) The applicant's later absence and return to the United States was under the terms of an advance parole authorization...

The court cited the text of the revised regulation as reading:

> (i) In General. In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as *an arriving alien*), the immigration judge hearing the proceedings has exclusive jurisdiction to adjudicate *any* application for adjustment of status the alien may file...

8 C.F.R. section 1245.2(a)(1)

Obviously, the two regulations are not identical. In the original regulation, the burden to establish that the immigration judge has jurisdiction to adjudicate a renewal application is placed upon the alien; in the revised regulation, the immigration court is presumed to have jurisdiction over such applications as the court is granted ***exclusive jurisdiction*** over such applications in all cases other than those in which the alien is an arriving alien. Inasmuch as exclusive jurisdiction vested under the revised regulation, unless the Petitioner was properly deemed to be an arriving alien, the question of whether the grant of withholding relief terminated his parole status was a relevant issue that needed to be resolved by the Board before the Court of Appeals could properly decide whether the

adverse decision rendered by the Board was justified.[6]

It is clear that the Court of Appeals made its assertion that the revised regulations did not support the Petitioner's legal challenge without considering the impact the Petitioner's grant of withholding of removal had on his status as a parolee. Stated differently, the Court presumed that the Petitioner continued in his status as a parolee irrespective of his grant of withholding relief in the absence of any administrative analysis that this was so.

That presumption was, by the Court's own admission, erroneous as it had determined previously in *Zheng* (supra), that immigration parole is not a grant of relief from removal. The court noted the clear distinction between the status of an alien granted parole and one granted relief from removal during

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[6]While the Court of Appeals noted correctly that Petitioner did not challenge his status as an arriving alien in the administrative proceedings, it ignored the fact that he could not have challenged that status until he was granted an alternate status. His grant of withholding was only confirmed on or about February 14, 2006 and as of that date, the Board determined that the Petitioner established his eligibility for a mandatory form of relief from removal. As such, the Board erred in continuing to assert 8 C.F.R. 1245.2(a) against Petitioner as justification for its refusal to remand the proceedings to the immigration court without providing some analysis as to why it believed that, notwithstanding the grant of withholding relief to Petitioner, section 1245.2(a) was still applicable.

the course of immigration proceedings. The Court, in interpreting the provisions regarding parole in the Immigration and Nationality Act, 8 U.S.C. section 1182(d)(5)(A) stated: " Parole is a form of relief from immigration *detention*; it is not a form of relief from *removal proceedings*, and when the purposes of parole have been served the parolee must be returned to custody and removal proceedings must continue." (emphasis in original)

The Respondent has complete discretion as to whether to grant an alien parole. [See, 8 U.S.C. section 1182 (d)(5)(A)] The Respondent has, however, no discretion as to whether to grant withholding relief as that form of relief is mandatory and must be granted where the statutory requirements are met. Under the Immigration and Nationality Act, the Respondent "may not" remove an alien to the country of danger if the statutory elements are met. [See, 8 U.S.C. section 1231(b)(3)(A)]

Petitioner asserts that the grant of this mandatory relief to Petitioner by the Board during the course of the removal proceedings rendered its assertion that Petitioner was subject to the parolee restrictions of section 1245.2(a) improper. Inasmuch as grant of parolee status to any alien is wholly within the discretionary[7] authority of the Attorney General, it is clear that the mandatory lawful status accorded to the Petitioner upon receipt of withholding relief can not be deemed to be consistent with his former status as a parolee. Upon the grant of withholding relief,

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[7]See INA 8 USC section 1182(d)(5)(A)

the Petitioner's status was altered substantially to the extent that his ability to reside in the United States was not a matter left up to the Respondent's discretion.[8] As such, once granted withholding relief, the Petitioner was no longer a parolee, at least not one whose ability to seek adjustment of status in removal proceedings could be said to have been precluded by 8 C.F.R. section 1245.2(a).[9] Accordingly, the Petitioner asserts that the Board erred in relying upon this regulation to prevent Petitioner from renewing his adjustment application in proceedings.

It is significant to note that in *Jiang* (supra), the Ninth Circuit tacitly acknowledged that grant of some forms of lawful status may, in under some circumstances, authorize adjudication of an adjustment

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[8]While it is true that the Respondent retained the right to seek to move the Petitioner to a third country, unless and until the Respondent is able to do so, the Petitioner retains lawful status in the United States and has a mandatory right to reside here. Further, the Respondent does not possess the discretion to detain the Petitioner at its whim as it could a parolee.

[9]Similarly, it is doubtful that the Petitioner could rightly be deemed to be an arriving alien subsequent to the grant of his withholding application as the Petitioner is not seeking admission to or transit through the United States. See, *In re Oseiwusu*, Int. Dec. # 3344 (BIA 1988)

application[10], even where the alien has not been admitted or inspected, or in possession of parole. In view of the uncertainty as to whether Petitioner's receipt of withholding relief was sufficient to render him eligible to renew his adjustment application before the immigration court, the Court of Appeals should have remanded the Petitioner's case to the Board.

Petitioner acknowledges that with respect to the Board's interpretation of the revised regulations that the Court of Appeals had no jurisdiction to make an original determination as to whether the Petitioner's grant of withholding relief exempted him from the bar against renewal of his application for adjustment of status that applies to arriving aliens under revised 8 C.F.R. section 1245.2(a). It could not do so, because the Board never considered the issue below. The Court of Appeals error was that it refused Petitioner's remand request . Remand was required because the reason the Board never considered the issue below was because the relevant regulation upon which Petitioner relies had not yet been adopted at the time the Board's decision was rendered. Accordingly, Petitioner asserts that sufficient justification existed to authorize remand.

Petitioner acknowledges that with respect to the

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[10]Noting that the Attorney General and the Secretary of State to have, on occasion, been directed, by Executive Order, view the maintenance of lawful status as sufficient for an alien's pursuit of adjustment of status

Board's interpretation of the revised regulations that the Court of Appeals had no jurisdiction to make an original determination as to whether the Petitioner's grant of withholding relief exempted him from the bar against renewal of his application for adjustment of status that applies to arriving aliens under revised 8 C.F.R. section 1245.2(a). It could not do so, because the Board never considered the issue below. The Court of Appeals error was that it refused Petitioner's remand request . Remand was required because the reason the Board never considered the issue below was because the relevant regulation upon which Petitioner relies had not yet been adopted at the time the Board's decision was rendered. Accordingly, Petitioner asserts that sufficient justification existed to authorize remand.

Petitioner further acknowledges that the issue of whether grant of withholding relief to a parolee is sufficient to invoke INA section 245(a) is unclear as the statute refers to aliens who have been admitted and inspected or paroled. The error of the Court of Appeals was that it did not permit remand to give the Board an opportunity to determine whether the Petitioner's parole status was properly deemed to have continued after the grant of withholding or, if the parole status did not continue, whether the lawful status granted to Petitioner through withholding was sufficient to place Petitioner outside the restrictive language of both 8 C.F.R. sections 1245.2(a) and 1245.2(a)(1) regarding parolees and arriving aliens respectively. The Board's failure to address this issue prior to its denial of the Petitioner's motion for remand to the immigration was

a plain and substantial error that was overlooked by the Court of Appeals. The most appropriate remedy would have been for the Court of Appeals to remand the matter to the agency for further consideration, but it declined to do so.

Further the Court erred in refusing to permit remand to allow the Board the opportunity ton determine whether the "any application for adjustment of status" language of revised section 1245.2(a)(1) would have permitted Petitioner to file either a completely new adjustment application or renew, in proceedings, the application that had been denied previously.

CONCLUSION

The decision rendered by the Court of Appeals for the 3rd Circuit below has created significant questions regarding the proper interpretation of revised regulation 8 C.F.R. section 1245.2(a)(1) a the agency clearly intended that regulation to authorize immigration judges to exercise exclusive jurisdiction over original and renewed adjustment applications presented by aliens in removal proceedings who possess an immigration status other than that of an arriving alien. Inasmuch as the Board had not yet had an opportunity to determine whether the grant to the Petitioner of withholding status qualified as status other than that of an arriving alien such that the immigration court had jurisdiction over the Petitioner's adjustment application, the Court of Appeals erred in making an original adverse determination on that issue.

Similarly, the Court erred in failing to remand the proceedings to the Board in view of the Board's erroneous determination that the Petitioner was subject to the parolee provisions of former 8 C.F.R. section 1245.2(a) subsequent to Petitioner's grant of withholding relief.

The petition for writ of certiorari should be granted.

Sincerely,

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PRECEDENTAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1949

BORIS VAKKER,
Petitioner
V.
ATTORNEY GENERAL OF THE UNITED STATES
Respondent

On Petition For Review of an Order of the Board Of Immigration Appeals
No. A 79-014-570
Immigration Judge: Hon. Walter A. Durling

Submitted Pursuant To Third Circuit L.A. R. 34.1(a)
February 12, 2008
Before: SLOVITER, SMITH, and STAPLETON,
Circuit Judges
(Opinion Filed: March 14, 2008)

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OPINION OF THE COURT

STAPLETON, Circuit Judge:

In the course of removal proceedings brought against him by the Immigration and Naturalization Service, Boris Vakker, a "paroled" alien, requested that the Immigration Judge ("IJ") permit him to renew a previously denied application for adjustment of status. The IJ denied the request. While the proceedings were on appeal to the Board of Immigration Appeals ("BIA"), Vakker filed a motion with the BIA to remand his case to the IJ for reconsideration of the adjustment of status issue

predicated upon an intervening case of this court. The BIA denied the motion to remand, and Vakker petitions this court for review of that ruling. For the reasons that follow, we will deny the petition.

I.

Petitioner, a native of Russia, initially arrived in the United States after being granted "parole" status. 8 U.S.C. section 1182(d)(5). He then applied for adjustment of status. 8 U.S.C. section 1255; 8 C.F.R. 245.7. However, while that application was pending, he was convicted of conspiracy to commit alien smuggling. His conviction rendered him ineligible for adjustment of status. 8 U.S.C. section 1182(a)(6)(E), and the Immigration and Naturalization Service ("INS"), now the Department of Homeland Security's Citizen and Immigration Services ("CIS"), therefore denied his application.

Following his conviction, the INS served the petitioner with a Notice to Appear, charging him with removability on three grounds: conviction of a crime involving moral turpitude, lack of entry documents and alien smuggling. *See* 8 U.S.C. section 1182(a)(2)(A)(i)(I), 1182(a)(7)(A)(i)(I), 1182(a)(6)(E)(I). The IJ found him removable. Petitioner sought asylum, withholding of removal and protection under the Convention Against Torture ("CAT"). Petitioner also sought to renew his application for adjustment of status.

The IJ determined that the petitioner qualified for withholding of removal. The IJ, however, denied

petitioner's request to renew his adjustment of status application because, it concluded, then-applicable regulations precluded all "paroled" aliens from seeking adjustment of status, 8 C.F.R. section 1245.1(c)(8) (repealed May 12, 2006), invalidated by *Zheng v. Gonzales*, 422 F. 3d 98 (3rd Cir. 2005)[11] , and the IJ therefore lacked jurisdiction over such an application.

The Attorney General appealed the IJ's decision granting petitioner withholding of removal to the BIA. Petitioner did not initially appeal the IJ's denial of his request to renew his "adjustment of status" application; however, after this court's ruling in *Zheng v. Gonzales*, 422 F.3d 98 (3rd Cir. 2005), which invalidated the regulation on which the IJ had relied, petitioner filed a motion with the BIA to remand the proceedings to the IJ for reconsideration of his request to renew his "adjustment of status" application.

The BIA issued a decision in which it dismissed the Attorney General's appeal because it agreed with the IJ that petitioner is eligible for withholding of removal. In the same decision, the BIA also denied petitioner's motion to remand on the "adjustment of status" issue. The BIA acknowledged that *Zheng* invalidated the authority upon which the IJ had relied. However, the BIA ruled that petitioner was nevertheless ineligible to renew his adjustment of status application "because he [did] not meet the renewal requirements under 8 C.F.R. section 1245.2(a)." A.R. at 11.

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[11] 8 C.F.R. section 1245,1(c)(8) has since been replaced with an unrelated regulation.

Vakker petitions this court for review of the BIA's denial of his motion to remand.

II

This court generally reviews motions to remand deportation proceedings, like motions to reopen or reconsider, for abuse of discretion. *Korytnyuk v. Ashcroft*, 396 F.3d 292, 279-83 (3rd Cir. 2005); *Shardar v. Attorney General*, 503 F.3d 308, 311-12 (3rd Cir. 2007). However, this court's review of the legal standards that the BIA applied when it denied Vakker's motion to remand is *de novo*: "questions of law, such as whether the BIA applied the correct legal standard in considering the motion to reopen and the underlying [legal] claim...are [] reviewed *de novo*."*Fadiga v. Attorney General*, 153-54 (3rd Cir. 2007), *See Also Cabrera-Perez v. Gonzales*, 456 F.3d 109, 115 (3rd Cir. 2006).

III

Vakker asserts that, following *Zheng*, he is facially eligible to renew his adjustment of status application, and that the BIA's decision denying his motion to remand on that issue was inadequate and denied him due process of the law. The Attorney General raises a jurisdictional challenge to Vakker's petition, which we will address before reaching the merits of Vakker's claims.

A.

The Attorney General argues that Vakker's petition for review was untimely. Pursuant to 8 U.S.C. section 1252(b)(1), "a petition for review must be filed not later than thirty days after the date of the final order of removal." We have jurisdiction over Vakker's petition under 8 U.S.C. section 1252(a)(1) and section 1252(b)(2) only if the petition was timely. See Stone v. I.N.S., 514 U.S. 386, 405 (1995) ("[j]udicial review provisions...are jurisdictional in nature"). We conclude that the petition was timely.

The BIA's February 14, 2006, "decision and order" resolved several issues and concluded with three "orders": one denying Vakker's motion to remand, one dismissing the Attorney General's appeal and one remanding the proceedings to the IJ for certain identity and background checks that are a prerequisite to the entry of any order granting withholding of removal.[12] Upon completion of those checks, the IJ issued a final order on March 13, 2006, granting Vakker withholding of removal. Vakker filed this petition for review on March 17, 2006. App. At 2.Therefore, his petition was untimely if the BIA's decision was the pertinent "final order," and it was timely if the IJ's order upon remand was the "final order".

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[12]The BIA remanded the petition to the IJ in accordance with 8 C.F.R.
section 1003.1(d)(6) and 8 C.F.R. section 1003.47(h). App. at 11.

Ordinarily, when the BIA remands removal proceedings to the IJ pursuant to 8 C.F.R. section 1003.47(h), the "final order" in the removal proceedings is the IJ's order following remand. *In re Fabricio Alcantara-Perez*, 23 I&N Dec. 882 (B.I.A. Feb. 23, 2006).[13] The Attorney General argues, however, that the various orders in the BIA's February 14, 2006 decision became "final" at different times:

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[13]The regulations themselves are fairly clear in this regard. For example, 8 C.F.R. section 1003.1(d)(6), provides:

> [t]he Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal, or other immigration benefit, as provided in 8 C.F.R. section 1003.47(b), that requires completion of identity, law enforcement or security investigations or examinations if:
> (A) identity, law enforcement or security investigations or examinations have not been completed during the proceedings;...

8 C.F.R. section 1003.1(d)(6)(i)(A) (emphasis added). Similarly, section 1003.47 provides as follows:

> (H) Adjudication upon remand from the Board. In any case remanded pursuant to 8 C.F.R. section 1003.1(d)(6), the immigration judge shall consider the results of the identity, law enforcement or security investigations or examinations...The immigration judge shall then enter an order granting or denying the immigration relief sought.

8 C.F.R. section 1003.47(h) (emphasis added).

that the BIA's order denying Vakker's motion to remand was a "final order" even if Vakker's removal proceedings became final later, in the Ij's March 13 order. We do not interpret the proceedings in that manner.

Certainly, orders denying motions to remand, like orders denying motions to reopen or reconsider, can qualify as independent final orders over which this court can, in appropriate circumstances, assume jurisdiction. See *Korytnyuk v. Ashcroft*, 396 F.3d 292, 279-83 (3rd Cir. 2005); *Shardar v. Attorney General*, 503 F.3d 308, 311-312 (3rd Cir. 2007); *Cruz v. Attorney General*, 452 F.3d 240, 246 (3rd Cir. 2006) *Sevoian v. Ashcroft*, 290 F.3d 166, 169-75 (3rd Cir. 2002). Indeed, this court has stated that:

> we can independently review the denial of a motion to reopen or reconsider...[and] a proper petition for review must be filed within [the appropriate time] *of the specific order* sought to be reviewed.

Alleyne v. I.N.S., 879 F.2d 1177,1180 (3rd Cir. 1989) (emphasis in original; internal quotation omitted). However, these cases do not establish that an order denying a motion to remand necessarily becomes "final" immediately, irrespective of the status of the proceedings in which it is entered.

8 C.F.R. section 1003.2(c)(4) provides: "A motion to reopen a decision rendered by an Immigration Judge ...that is filed while an appeal is pending before the Board, may be deemed a

motion to remand for further proceedings before the Immigration Judge ...from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board." Id. (emphasis added).

Here, the BIA chose to consolidate petitioner's motion to remand with the Attorney Genera's appeal of Vakker's removal proceedings rather than to entertain that motion as an independent proceeding. It issued just one decision which addressed both the Attorney General's appeal and Vakker's motion. This was, of course, not surprising given that petitioner had originally raised both issues- relief from deportation, and renewal of his adjustment of status application - in the same hearings before the IJ, and the IJ had addressed both issues in those hearings. Petitioner presented the "adjustment of status" issue to the BIA in a motion to remand rather than in a traditional appeal only because the motion relied on intervening case law published after the IJ issued his original decision. Therefore, the two issues had in fact been considered and addressed jointly both by the IJ and by the BIA. As a result of the BIA's consolidation of these matters, it follows that its February 14, 2006, order did not finally adjudicate all issues in the proceeding in which it was entered and was therefore not a final order.

The Attorney General identifies no authority indicating that the pertinent judicial review provisions operated to render the BIA's orders "final" at different times under the circumstances of this case, and we find none. The Attorney General relies on *Popal v. Alberto*

Gonzales, 416 F.3d 249 (3rd Cir. 2005). That case is inapposite: it concerned exhaustion rather than what constitutes a "final order", and its reasoning does not support the notion that there were multiple "final orders" in this case. The most sensible interpretation of 8 U.S.C. section 1252(b)(1) in this case is that the consolidated proceedings became "final" at the same time. As the BIA has explained, once the BIA determines that an alien is "eligible for the relief requested" and remands the deportation proceeding to the IJ for the requisite background checks, the IJ's ensuing order "granting relief...then becomes the final administrative order in the case." I*n re Fabricio Alcantara Perez*, 23 I&N Dec. At 884-85. Although *In re Fabricio Alcantara-Perez* did not address the precise question before us, it recognized that the IJ's final order applies to the "case", rather than "issue" or the "relief granted." That was true irrespective of the fact that such remands do not "provid[e] an opportunity for the parties to relitigate issues that were previously considered and decided." *Id* We find no reason to reach a different conclusion in this case, and we hold that the BIA's denial of Vakker's motion to remand became final at the same time as the remainder of Vakker's "case": at the time of the IJ's March 13, 2006, order. Vakker's petition for review was therefore timely.

B.

Vakker argues that he had become "at least facially eligible" to renew his application for adjustment of

status following this court's decision in *Zheng v. Gonzales*, 422 F.3d 98 (3rd Cir. 2005), and that the BIA's decision denying his motion to remand was inadequate because the BIA failed to specify which requirements rendered him ineligible. Vakker also insists that the BIA's decision violated his Due Process rights. Finally, Vakker contends that we should grant his petition in order to afford the BIA an opportunity to assess his motion in light of interim regulations passes by CIS subsequent to the BIA's decision.

The BIA's decision was neither inadequate for failing to "specify which of the mandated requirements Petitioner failed to meet," Petitioner's Br. At 25, nor violated Vakker's Due Process rights. The BIA's opinion recognized that our decision in *Zheng*, 422 F.3d at 119-20, invalidated the prior 8 C.F.R. section 1245.1(c)(8), insofar as it had categorically rendered all "paroled" aliens ineligible to apply for adjustment of status. App. At 10-11. However, the BIA ruled that Vakker was nevertheless ineligible to have his request to renew his adjustment of status application reconsidered in the course of his removal proceedings. As the BIA explained, "the respondent remains ineligible to renew his adjustment application because he does not meet the renewal requirements under 8 C.F.R. section 1245.2(a)". App. At 10-11. At the time of the BIA's decision, that regulation set forth the following rule:

An adjustment application by an alien paroled under section 212(d)(5) of the Act, which has been denied by the director, may be renewed in removal proceedings under 8 CFR part 1240 only if:

> (i) the deined application must have been properly filed...; and
> (ii) The applicant's later absence and return to the United States was under the terms of an advance parole authorization on Form I-512 granted to permit the applicant's absence and return to pursue the previously filed adjustment application.

8 C.F.R. section 1245.2(a)(i) (amended May 12, 2006)

Petitioner was "paroled" alien seeking to renew a previously denied application, and he does not argue that the exception specified in section 1245.2(a)(1)(i) and(ii) applies to him. Petitioner was "in removal proceedings," 8 C.F.R. section 1245.2(a)(1) (amended May 12, 2006) both when he filed his motion to remand and when the BIA denied it. Vakker points to no reason why, given the plain language of section 1245.2(a)(1), he would have been eligible to renew his application in his removal proceedings before the IJ. Therefore, the BIA's decision to deny Vakker's motion to remand was not in error. Similarly, the BIA's decision did not deny Vakker due procees of the law because the BIA considered Vakker's motion and properly denied it, providing adequate explanation and authority to support its decision.

We disagree with petitioner insofar as he argues that the BIA's decision was insufficient because it "cited no factor that rendered the *Zheng* decision inapplicable to Petitioner's request for remand." Petitioner's Br. At 25. The BIA cited *Jiang v. Gonzales*, 425 F.3d 649 (9th Cir. 2005) which held that section 1245.2(a), unlike the regulation invalidated in

Zheng, was not contrary to the INA. *Id.* at 653 ("we reject *Jiang's* claim that 8 C.F.R. section 1245.2(a)...is invalid because it violates INA section 245(a)...[That regulation] is not inconsistent with the provisions of the INA.") In *Zheng* we held that 8 C.F.R. section 1245.1(c)(8) (repealed May 12, 2006) was contrary to the Congressional intent behind INA section 245(a) because it categorically precluded all "parolees" from having their adjustment of status applications considered in the first instance. The court pointed out in *Jiang* that the same rationale did not apply to section 1245.2(a)(1) (amended May 12, 2006), which (with limited exceptions) only precluded paroled aliens from having a previously denied application re-considered during removal proceedings.

Although the CIS recently revised section 1245.2(a)(1), that revision occurred after the BIA issued its decision, and in any event, the revised regulations appear to offer Vakker no greater support than the previous versions. The revised regulations state:

> (i) In General. In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien), the immigration judge hearing the proceedings has exclusive jurisdiction to a djudicate any application for adjustment of status the alien may file,
>
> (ii) Arriving aliens. In the case of an arriving alien who is placed in removal proceedings,

> the immigration judge does not have jurisdiction to adjudicate any application for adjustment of status filed by the arriving alien
>
> unless:
>
> [four enumerated conditions are satisfied].

8 C.F.R. section 1245.2(a)(1). "Paroled" aliens are generally "arriving aliens", *see* 8 C.F. R. Section 1.1(q); *Zheng*, 422 F.3d at 110-11 and n.10, and petitioner does not argue that he is not an "arriving alien". Nor does petitioner argue that the section 1245.2(a)(1) exception, *see* section 1245.2(a)(1)(ii)(A-D), applies to him. Instead, petitioner argues that "pursuant to the interim rules, the removal proceedings can not be concluded without a determination from the agency regarding [his] application." Petitioner's Br. At 27. He offers no support for that argument and no explanation for why it is consistent with section 1245.2(a)(1)(ii). Petitioner further emphasizes that he is no longer in removal proceedings because a final order has issued in his proceedings. However, he was in removal proceedings both when he filed his motion with the BIA and when the BIA denied it. Furthermore, petitioner seeks to have his claim remanded to the IJ: if he is no longer in removal proceedings, under the interim regulations the IJ plainly lacks jurisdiction to hear the claim. 8 C.F.R. section 245.(a)(1) ("USCIS has jurisdiction to adjudicate an application for adjustment of status filed by an alien, unless the Immigration Judge has jurisdiction to adjudicate the application under 8 C.F.R. section 1245.2(a)(1)."); 8 C.F.R. section

1245.2(a)(1) (*see supra*). Therefore, petitioner has offered no argument why the new regulations would better aid his cause than the version in force at the time the BIA decided his motion. We express no opinion regarding whether Vakker might be entitled to renew his application in another manner, but the BIA did not err when it denied his motion to remand his proceedings in order to renew his application before the IJ.

IV

For the foregoing reasons, we will deny the petition for review.

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office For Immigration Review
Falls Church, Virginia 220412

File: A79- 014-570- York Date: FEB 14, 2006
In re: BORIS VAKKER
IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT:
Sandra Greene, Esquire
ON BEHALF OF DHS:
Jon Staples
Assistant Chief Counsel

CHARGE:
Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. section 1182(a)(2)(A)(i)(I)]-
Crime involving moral turpitude

Sec. 212(a)(7)A)(i)(I), I&N Act [8 U.S.C. section 1182(a)(7)(A)(i)(I)]-
Immigrant - no valid immigrant visa or entry document

Sec. 212(a)(6)(E)(i), I&N Act [8 U.S.C. section 1182(a)(6)(E)]-
Alien smuggler

APPLICATION: Withholding of removal; remand

The Department of Homeland Security (the "DHS", formerly the Immigration and Naturalization Service) appeals from an Immigration Judge's April 25, 2005, grant of withholding of removal. The respondent moves to remand this matter back to the Immigration Judge for an opportunity to apply for adjustment of status. DHS opposes the motion. The respondent's motion will be denied that the appeal will be dismissed.

We first consider the respondent's motion to remand. In the proceedings below the respondent sought to renew his application for adjustment of status.[1] The immigration judge denied the request to renew for lack of jurisdiction due to the respondent's status as a parolee (Tr. At 6 - 21; Respondent's Motion at para. 2. The new case cited in the respondent's motion finds the regulatory jurisdictional bar invalid. *Zheng v. Gonzales*, 422 F.3d 98, 120 (3rd Cir. 2005) (holding that 8 C.F.R. section 1245.1(c)(8) is invalid insofar as it renders parolees ineligible to apply for adjustment of status) Despite this change of law, the respondent remains ineligible to renew his adjustment application because he does not meet the renewal requirements under 8 C.F.R. section 1245.2(a). *See*

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[1]The respondent applied for adjustment with the district director on August 13, 2002. The application was denied on October 22, 2004, due to the respondent's conviction for alien smuggling (Exh. 2) (DHS Evidence submitted November 24, 2004).

Jiang v. Gonzales, 425 F.3d 649 (9th Cir. 2005). Accordingly, the respondent's motion is denied.

With regard to the appeal, DHS argues that the harm suffered by the respondent between 1999 and 2001 does not amount to persecution; he didn't prove that he was singled out on account of his religion; and because he didn't report the incidents to the police he cannot establish that the government was unwilling or unable to protect him. We disagree.

The respondent was physically attacked on three different occasions with each resulting in injury (Tr. At 70-71; Exh 2 (Personal Statement). Further, at least one of these attacks required the respondent to seek medical attention at a hospital (Tr. At 83). Thus we find that the harm suffered by the respondent does rise to the level of persecution. *See Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998).

The basis for at least two of the attacks was on account of the respondent being identified as a Jewish person (Tr. At 71; Exh. 2)(stating that his attackers said "only misery comes from Jewish people" and "why are you still here when the other Jews have gone?") Thus the respondent has demonstrated that he was persecuted on account of his religion. *See INS v. Elias-Zacarias*, 502 US. 478 (1992); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000); *Matter of S-P-*, 21 I&N Dec 486 (BIA 1996)

Finally, the voluminous background information in the record documents the frequent instances wherein the local government fails to investigate, prosecute, or punish individuals who attack both ethnic and religious minorities such as the respondent. *See*

e.g. Exhs. 2,6. When the respondent's past harm is considered within this context his decision not to report the attacks does not negate his claim of past persecution. Further, we agree with the Immigration Judge that DHS has not proved a fundamental change in circumstances or that it is reasonable for the respondent to internally relocate (I.J.at 6).

Accordingly, the following orders will be entered.

ORDER: The respondent's motion to remand is denied.

FURTHER ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. section 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F. R. Section 1003.47(h). *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005)

/s/ Roger Pauley
FOR THE BOARD